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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 256

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN AND IRVING ELENTUCH,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER, BENJAMIN SCHWARTZ.

LESTER R. BACHNER,
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Benjamin Schwartz.

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BRIEF ON BEHALF OF PETITIONER, BENJAMIN SCHWARTZ.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 120 F. (2d) 485. No opinion was rendered in the District Court.

Jurisdiction.

The jurisdiction of this Court is invoked under § 240-a of the United States Judicial Code. The judgment of the Circuit Court of Appeals was entered on June 18, 1941, and the petition for a writ of certiorari was filed on July 11, 1941.

Statement of the Case.

This is a continuation of the same prosecution (though under a different indictment) as that which was before this Court in *Weiss* v. *United States*, 308 U. S. 321. Petitioner, Goldstein, in this case was one of the defendants in the *Weiss* case. In the course of that trial the Government introduced evidence obtained by wiretapping. Although the wiretapping in that case did not involve the defendant, Goldstein, his conviction, as well as that of the other defendants, was reversed.

Subsequently, an application was made by the defendants for a preliminary hearing for the purpose of suppressing evidence obtained as the result of wiretapping. Judge Byers, before whom that hearing was held, ruled (34 F. Supp. 99) that the Government might not use any records or transcripts of intercepted telephone messages and that all evidence obtained as the result of the use of these messages be likewise suppressed. The court refused to rule that the Government could not call certain witnesses who had confessed, it being the contention of the defendants that these confessions were induced by the wiretapping.

The *Weiss* case was subsequently abandoned upon the defendants in that case, with the exception of Goldstein, having pleaded guilty. The indictment in the case at bar was then brought on to trial. Except for Goldstein, none of the defendants in the case at bar were involved in the *Weiss* case.

As this Court will remember, the charge in these cases is the use of the mails pursuant to a scheme to defraud insurance companies by inducing them to pay false claims for disability, health and accident benefits. Some of the defendants indicted were claimants, some lawyers, some, like Goldstein and Schwartz, were doctors, and others were

individuals who, it is charged, obtained the business which was handled by the doctors and lawyers.

1. Prior to the trial of the case at bar, defendants made an application similar to that which had been made in the *Weiss* case (R. 103-112).[1] At the hearing held before the same Judge, part of the testimony taken in the *Weiss* case was placed in evidence (R. 114, 115). Additional witnesses were likewise called. It was admitted by the Government that there had been wiretapping. While the record indicates that some of the wiretapping involved certain of the defendants in the case at bar (R. 148) it is not clear from the record whether there was any wiretapping of the wires of any of these defendants (see R. 610). This phase of the case was not developed at the preliminary hearing, or at the trial, because on neither occasion was any question raised with regard to the right of the defendants to complain of the illegal wiretapping. That, however, has become the chief issue here because the Circuit Court of Appeals disregarded the theory upon which the case was tried and rested its affirmance mainly on this point.

The preliminary hearing concerned itself with two matters, the extent of the evidence which the Government had which was free from any taint of wiretapping; the right of the Government to use the witnesses, Messman and Garrow who, it was claimed by the defendants, had been induced to plead guilty and testify as the result of their confrontation with the records of the illegally intercepted telephone communications. Judge Byers ruled at the preliminary hearing in this case, as he had done in the *Weiss* case, that there was substantial evidence free from taint which the Government should be permitted to offer at the trial. He ruled, both at the preliminary hearing (R. 614) and at the trial, (R. 962, 2110) that Messman and Garrow were not

[1] The references in roman type are to the typewritten record; those in italics to the printed record.

disqualified from testifying, on the ground that, as he had stated in the *Weiss* case (34 F. Supp. 101, 102), the decision of the witnesses to testify was based on self-interest rather than contamination by wiretapping. It had not been disputed in the Trial Court that if defendant's contentions as to the facts were correct, then the testimony of these witnesses would be the "fruit of the poisonous tree" of the Government's illegality, and barred under this Court's decision in the second *Nardone* case, 308 U. S. 338. The Circuit Court of Appeals, however, reached the conclusion that Messman at least, was induced to testify in consequence of illegal wiretapping (*R. 22*,[2] 120 F. [2nd] 488).

We shall not at this time discuss the facts upon which we base our contention that Messman was disqualified from testifying, since our view has been accepted below, but shall merely call to this Court's attention its own description of Messman's testimony in the *Weiss* case (308 U. S. at 330):

> "It is said, however, that when some of the defendants pleaded guilty, elected to take the stand and to testify to the contents of the messages, they gave the authorization contemplated by the statute. We have already adverted to the method by which this supposed authorization was obtained. Certain of the defendants who were participants in the telephone conversations were informed of the Government's possession of the contents of their communications. Under the stress of this situation they determined to turn state's evidence. Messman's license to practice medicine has not been revoked; he was not required to plead to the indictment; he was paid a salary by the Government, first of $65.00 per week and later of $100.00 per week, amounting, in the total, to $3,237.12."

The Circuit Court of Appeals, despite its ruling that this testimony was tainted and was vital to the prosecution,

[2] The references in italics are to the printed record.

affirmed the convictions on the ground that defendants in the case at bar had no standing to raise the issue of taint because they had not been parties to conversations over tapped wires.

2. The rulings of the District Court with respect to the conduct and scope of the preliminary hearing unduly hampered petitioners' efforts to develop proof in support of their contention that the Government's evidence had been obtained, directly or indirectly, as a result of the use of illegally intercepted telephone messages. An attempt to limit witnesses to stating evidence rather than their own conclusions was prevented by the Court. (R. 257, 280). The unrestrained expression of witnesses' opinion was permitted. (R. 256, 301, 307, 308, 626, 675, 753 et seq. 757-60).

The Court refused to permit petitioners to inspect numerous documents to ascertain how thoroughly interwoven illegal strands of evidence were with legal strands of evidence (Prelim. Hearing Exhibits Shea's Report, not marked (R. 292-3) and Exhibits BB (R. 323), DD (R. 371), DD (R. 373). The court examined these documents but would not permit petitioners to see them. The full import of the material which they contained could only be determined by petitioners, particularly since independent reading by a Judge unfamiliar with the ramifications of the case could be of no assistance in determining whether any particular evidence had been derived from the tainted source. Only where wiretapping was expressly mentioned or where the Government gave its consent were petitioners permitted to examine even portions of documents. (See R. 131-2, 136, 137-8, cf. 150, 293, 307, 340).

This was particularly prejudicial in view of the fact that petitioners were trying to show that wiretapping had entered into the preparation of the case even prior to the time it had been brought to the United States Attorney's office, after which time wiretapping was admittedly con-

ducted with the Government's knowledge and assistance.

The insurance companies had obtained an informer named Kipnis, who is alleged to have given a story which obviously "would not be believed unless thoroughly corroborated" (*R. 21;* 120 F. (2d) at 487).

Wiretaps were used by the insurance companies to obtain that corroboration. After the matter was brought to the United States Attorney's office, wiretapping was employed under the Government's supervision, taps being placed on the offices of Garrow, Dr. Messman and the home and office of Joseph J. Weiss (R. 101-102, 148, 781).

Petitioners contended that the taps, in addition to being used to break down Messman and Garrow, had served the purpose of furnishing clues and leads to refresh the recollection of these witnesses and others and to obtain additional information. In fact, it was claimed that the illegal taint attached to every bit of the Government's evidence.

The Circuit Court of Appeals held (*R. 30;* 120 F. (2d) at 492), that despite the fact that the District Judge "did indeed express himself once or twice in a way that seemed to restrict the examination unduly" nevertheless he did not so conduct the hearings as to violate the general principles announced by this Court in *Nardone* v. *United States*, 308 U. S. 338. Moreover, the Court held that any question as to the conduct of the hearing was immaterial, in view of the fact that the petitioners had no standing to complain of the use to which the intercepted messages were put.

3. The trial was long. The chief testimony against petitioners was, as recognized in the Court of Appeals, the testimony of Messman and Garrow, confessed wrongdoers. The chief issue was whether or not the particular defendants accused actually participated in the illegal conspiracy of which Messman and Garrow were the leading spirits. The defendants took the stand in their own behalf. Sharp issues

of fact were thus created. That the Government's case against petitioner, Schwartz, was weaker than that against the other defendants may be inferred from the fact that after the jury was out a long time it asked for a reading of some of the testimony dealing with Schwartz (R. 5180 and following).

In such a situation it behooved the trial court to present the issues as fairly as possible to the jury, to submit to the jury the conflicting contentions of both sides and guide it to a just result, having in mind both the rights of the defendants and those of the United States. It is submitted that particularly with regard to petitioner, Schwartz, the Judge failed in his performance of this obligation. Nowhere will there be found any statement of the evidence in support of the defense, or even any clear statement of the contentions of the defense. The portion of the charge relating to petitioner Schwartz consists almost entirely of a series of hypothetical questions, so framed as to indicate only one possible answer, and that an answer unfavorable to this petitioner. As was said by the Circuit Court of Appeals (*R. 29*, 120 F. (2d) at 491):

> "These he did indeed couch in such a way as to make fairly apparent what answers he would himself have given to them; and it must be owned that the answers were damaging."

The particular portions of the charge relating to this petitioner will be more fully discussed hereafter. The Circuit Court of Appeals in sustaining the charge said that the intimations of the Judge were "oblique" only and stated that in other parts of the charge he had cautioned the jury not to take his opinion as authoritative.

Errors Intended To Be Urged.

The assignments of error relied upon by petitioner, Schwartz, are the following:

Nos. 1-7 (R. 5219-5221) dealing with the preliminary hearing; No. 9 (R. 5221) dealing with the testimony of Messman and Garrow at the trial and Nos. 12-14 (R. 5222, 5223) dealing with the charge.

Summary of Points Relied Upon:

POINT I.

PETITIONERS ARE IN A POSITION TO OBJECT TO EVIDENCE OBTAINED AS THE RESULT OF ILLEGAL WIRETAPPING.

POINT II.

THE DISTRICT COURT UNDULY RESTRICTED THE SCOPE AND CONDUCT OF THE PRELIMINARY HEARING.

POINT III.

THE TRIAL COURT'S CHARGE WAS UNFAIR.

POINT I.

Petitioners Are in a Position to Object to Evidence Obtained as the Result of Illegal Wire-Tapping.

We believe this basic point to have been decided, though not discussed, by this Court in the *Weiss* case (308 U. S. 321). For in that case this Court reversed the conviction of one of the defendants, Goldstein, although his wires had never been tapped and the prosecution, in its brief, contended that Goldstein's conviction should, therefore, be affirmed. A like conclusion had been arrived at, also without discussion, by the Circuit Court of Appeals for the Second Circuit in *United States* v. *Bernava*, 95 F. (2d) 310.[3]

[3] In *United States* v. *Seeman*, 115 F. (2d) 371, the same Court later reached a contrary conclusion, but primarily on the ground that none of the conversations involved the particular defendant appealing.

In the case at bar the Circuit Court of Appeals took the view that in the *Weiss* case this Court had "disregarded" the point involved. It is somewhat difficult to understand the reasons given by the Circuit Court for reaching that conclusion. At one point it is suggested that it would have been too difficult to conduct a trial at which the conversations might have been introduced in evidence against Goldstein alone; immediately afterward it is suggested that if the trial had been fairly conducted, the conversations would not have been received in evidence at all. We do not believe that any such fine spun theories can account for this Court's decision. On the contrary, it seems apparent that this Court, on broad principles of justice, decided that whenever evidence has been admitted against all of the defendants and it was illegally received as to some, all of the defendants might take advantage of that error. While that ruling may not reach as far as the circumstances of the instant case, it clearly disposes of the general contention of the government that no one can complain of the illegality of the evidence except persons who were parties to the conversations. And in a case like the present where the persons whose wires were tapped were not made defendants, but the tapping was the source of the evidence used to convict, the same result should follow.

It is clear that there is nothing in the Communications Act (47 U. S. C. 605) which justifies any use of wire taps merely because the use is in connection with individuals whose conversations were not overheard. The prohibition of the statute is complete. The only exception is where the interception itself was consented to, thus not illegal. We shall deal with that phase of the case more in detail hereafter.

The Circuit Court of Appeals (120 F. (2d) at 489) based its decision adverse to petitioners on two grounds: It held first, that only a person whose conversations were tapped

could object to such tapping, and second, that even if this were not so, and other persons might object to the introduction of the wire taps themselves, they could not object to evidence which was merely obtained as the result of the use of such taps. This last position is based upon so obvious a misreading of the applicable statute (47 U. S. C. 605) that the government in its brief on the application for certiorari in effect conceded that the Circuit Court of Appeals had been in error in sustaining the decision on that point (Brief p. 16, footnote 9). We shall deal no further with that aspect of the case unless the government's brief requires some reference to it in a reply brief.

On the basic issue, whether one whose conversations had not been tapped, could object to testimony based on the wire taps or obtained from them, the decision of the Circuit Court of Appeals falls into several parts. That court assumed that the decision under the Communications Act on such a subject should be the same as would be a decision under the Fourth and Fifth Amendments and that under the Fourth Amendment a defendant could not object to the receipt in evidence of matter unconstitutionally seized from someone else, and under the Fifth Amendment that the privilege was wholly personal. The Circuit Court relied also on the fact that the statute referred to the sender's consent. In so doing the court disregarded the theory upon which the case was tried, no contention having been made by the government during the trial that defendants were not in a position to complain of the illegal wiretapping—nor was such contention made even in its brief in the Circuit Court.

We submit there is no parallelism, such as is proposed, between the Communications Act and the two portions of the Bill of Rights; that the Circuit Court misconceived the effect of decisions under the Fifth Amendment; and that

the rule as stated with regard to the Fourth Amendment, though widely held, is not correct.

1. The doctrine that no third person can complain of evidence illegally seized is, it must be conceded, an old one. But while generally accepted by the lower Federal courts, it has not, heretofore, been considered by this Court. We suggest that there is no basis for the form in which this rule has been stated. Judge Learned Hand in *Connolly* v. *Medalie*, 58 F. (2d) 629, which reviewed the earlier authorities, suggested that "the power to suppress the use of evidence unlawfully obtained is a corollary to the power to regain it." That confuses two entirely separate matters. Obviously a motion for the return of illegally seized property can be made only by a person who is either the owner of that evidence or is entitled to its possession. The fact that most such motions include an application for the suppression of the evidence is no basis for holding that the latter motion depends upon the former. If that were so, even the owner could not make a motion for the suppression of the evidence if it had been voluntarily returned to him. Yet such voluntary return does not preclude a motion to suppress. See *Flagg* v. *United States*, 233 Fed. 481.

An examination of the early cases dealing with this subject shows that they gave little thought to the fundamental principles involved. The first two cases dealing with the subject were deportation cases in both of which the Court merely said that no constitutional right had been invaded. (*Moy Wing Sun* v. *Prentis*, 234 Fed. 24; *Tsuie Shee* v. *Backus*, 243 Fed. 551). The next two cases dealt with reasonable subpoenas and search warrants directed to corporations. There was thus no violation of the Fourth Amendment and since corporations have no privilege against self-incrimination there was no room for invoking the Fifth Amendment. (*Linn* v. *United States*, 251 Fed. 476; *In Re Rosenwasser Brothers*, 254 Fed. 171). Under

such circumstances the papers were lawfully before the Court and no person could object to their use.

However, in *United States* v. *Silverthorne*, 265 Fed. 853, Judge Hazel briefly discussed the matter and said that the rights given by both the Fourth and Fifth Amendments "are expressly for the benefit of the person or individual whose rights have been invaded, and to transfer such rights to a person who may believe himself injured by the violation of the rights of another would give such scope to the Fourth Amendment as was never contemplated." But that decision rested primarily upon the basis that the individual whose property was seized was willing that it should be used against him and his co-defendants. Of course, if the owner of the property does not object to its seizure at the time or ratifies it afterward, there has been no violation of the Constitution at all and the question here involved does not arise.

We submit, therefore, that the reasons generally given for the rule dealing with third persons are not sound. On the other hand, sound considerations of policy require a different rule. Surely the application of the Fourth Amendment should not depend on property considerations. Moreover, evidence seized from A is generally admitted also against B either because they are jointly accused of substantive crime or it is alleged they were co-conspirators. If they are so closely associated as to permit the introduction against each of otherwise irrelevant evidence it would seem but just that the relationship be considered sufficiently close to permit each of them to complain of unconstitutional seizures from the other.

The problem can best be viewed in the light of certain possible combinations of circumstances. To take the classic case of a liquor violation. There is an illegal search of a house. A still and other incriminating materials are found. The occupant of the premises and several of his employees

are arrested and indicted. The occupant moves for the return of the seized property and the suppression of the evidence. The motion is denied and the evidence is received. All of the defendants are convicted. On appeal it is held that the evidence should not have been received. Necessarily the conviction of all of the defendants must be reversed. We believe that this is the meaning of this Court's decision in the *Agnello* case, 269 U. S. 20. For in affirming the convictions of certain of the defendants, this Court was careful to point out that the evidence illegally seized from Agnello had not been used against any of these defendants. The implication is thus clear that had such evidence been so used their convictions could not stand. That in effect is also what happened in the *Weiss* case, *supra*, where the conviction of Goldstein was reversed although his wires had not been tapped. Any other result would be shocking to any conceptions of justice.

Should the rule be different merely because the government may not have indicted the occupant of the premises or, having indicted him, was unable to find him so that only the others went on trial?

Should not the true rule be that whenever the facts show an unconstitutional search and seizure the evidence obtained as the result of that search and seizure cannot be used at all? Otherwise the constitutional protection could successfully be evaded in large measure. To permit the search of A's home for letters written to him by B and the search of B's home for letters written by A, and the use of these letters against their authors, although they could not be used against their recipients, would be to permit a result wholly at variance with the policy of the Fourth Amendment.

We shall now pass on to the supposed parallelism between the Constitution and the Communications Act urged by the Circuit Court of Appeals in support of its position.

2. The conclusion that the same rule must apply to wire-tapping as to searches and seizures or to self-incrimination rests upon a misconception of the nature of the prohibitions involved in the Communications Act and the Fourth and Fifth Amendments respectively. We shall deal separately with each of these Amendments. The Fourth Amendment is general in terms and is designed to protect the citizen against governmental oppression. Its meaning has been determined by this Court from time to time in the light of that basic position and in the light of the historical events which led up to its adoption. See *Boyd* v. *United States*, 116 U. S. 616. See also Fraenkel, Concerning Searches and Seizures, 34 Harv. L. R. 361-367. The rule that evidence obtained in violation of this amendment should not be used in Federal prosecutions was based on the belief that such a rule was necessary in order to give vitality to the prohibition of the Fourth Amendment. See *Weeks* v. *United States*, 232 U. S. 383; *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298. Should this Court reject the considerations just advanced and accept the view of the many lower Federal courts that only a person whose own property has been illegally seized can object to the seizure, that view would no doubt rest upon the belief that, as a matter of policy, the constitutional protection could be given effective meaning without carrying it to the extent of assisting persons who had no property interest in the matter illegally seized. In interpreting the Constitution this Court is the final organ on matters of policy involved in weighing conflicting interests.

But in enacting legislation Congress exercises this power of declaring policy and in the Communications Act Congress has declared this policy in clear and unmistakable terms. It has not only made the interception of wires a

crime, but it has expressly prohibited the divulgence of such messages and any use of the contents of the same. Here the primary question is not, as in the case of the Fourth Amendment, that of protecting the individual against governmental oppression. Indeed when the interpretation of this statute first came before this Court two of its members believed that it was not aimed at governmental acts at all. (See *Nardone* v. *United States*, 302 U. S. 379 at 385). However, the majority of the Court held that the plain language of the statute controlled and that it constituted a prohibition against the divulgence of messages, whether by governmental agents or by any other persons. And the ruling that such messages could not be received in evidence was made, not in the process of determining that without such result the purpose of the statute would be frustrated, as is the basis of the decisions under the Fourth Amendment, but in the process of applying the plain language of the statute. Congress, in other words, having declared that no messages might be divulged, it was obvious that they could not be divulged in Court any more than outside of court. The rule which forbade the use of such messages as evidence is also an integral part of the statute itself. And within the four walls of the statute there is no room for any inference that a message could be divulged so long as the parties to the message were not defendants before the Court. For the statute says nothing about litigation or parties.

That there are several situations in which evidence obtained in violation of the Communications Act would be barred, although under similar circumstances it would not be barred under the Fourth Amendment, is quite clear. Thus it has been held that in a Federal prosecution evidence obtained by state officers, without previous cooperation with the Federal government, may be received. (See *Byars* v. *United States*, 273 U. S. 28, and *Gambino* v.

United States, 275 U. S. 310). And seizure by private individuals likewise does not make the evidence inadmissible. (*Burdeau* v. *McDowell*, 256 U. S. 465). It could hardly be argued that either private individuals or state detectives would be allowed to testify about conversations which they overheard through illegal wire tapping. The supposed parallelism between the two grounds of exclusion thus does not exist.

3. The further suggestion in the Circuit Court of Appeals (*R. 26*; 120 Fed. (2d) at 489) that there is some analogy between the rights under the Communications Act and the Fifth Amendment is likewise not sound. The implication that this Court has dealt with the Fifth Amendment in the same way that other courts dealt with the Fourth Amendment is also without foundation in the authorities. *Hale* v. *Henkel*, 201 U. S. 43, referred to by the Circuit Court of Appeals, does no more than decide that an individual cannot refuse testimony by urging the supposed immunity of someone else.

In any event the Fifth Amendment is in terms personal and comes into play primarily with litigation. If a witness on the stand does not object to giving testimony on the ground that it might incriminate him, no one else can object. To that extent it is correct to speak of the privilege as being personal only. On the other hand, if the witness does object and the objection is overruled, evidence has been received in violation of the constitutional guaranty and in such case most courts permit any party to the litigation to raise the question on appeal. That is recognized by the Circuit Court of Appeals which, however, believes the rule not sound.[4]

[4] Citing Wigmore (§ 2196 3rd ed. Vol. VIII, pp. 102, 104). It is, of course, natural that Wigmore should accept the position of the minority of the courts on this subject since he has always sought to restrict the rule against self-incrimination (see § 2251, p. 318) and has opposed the doctrine of this Court banning evidence obtained as the result of unconstitutional search and seizure (§ 2184, Vol. VIII, p. 31, ff).

The further contention in the Circuit Court of Appeals that its position is in accord with the law of privileged communications generally, in that it is only the disclosure which is privileged, overlooks the fact that most grounds of privilege are based on relationship, such as between husband and wife, doctor and patient or attorney and client and that the law forbids disclosure by one of the parties in that relationship. The various dictograph cases cited have, therefore, no application here. For here we have a statute, as already noted, which absolutely forbids divulgence of the communication, not merely disclosure by a person standing in a particular relationship to another.

We submit, however, that there is in this case no analogy either with the law of privileged communications generally, or with the law of self-incrimination as followed by that minority of the courts with which the Circuit Court of Appeals concurred. We are here dealing, not with privilege at all, but with the plain command of a clear statute that the illegal evidence be not used.

4. The Circuit Court suggested finally (*R. 26, 27;* 120 F. (2d) at 489) that because the statute permits the "sender" to consent to the divulgence of the message there must be an inference that the right to withhold divulgence is personal to him only. That completely begs the question. In every case of alleged wrong, no wrong was committed when the act complained of was consented to by the party involved, or even, in some circumstances, when it was ratified by him. Thus there can be no unlawful seizure where free consent has been given at the time of the taking. That by itself throws no light whatever on the question whether an unlawful seizure can be complained of by someone other than the owner of the property. The consent affects only the legality of the act, not the consequences of an illegal act.

The suggestion that such consent might be given after the event and thus nullify any protest which a third person might make also begs the question. It may be assumed that a consent may be given after the interception as well as before, although this does not appear as clearly from the decision in the *Weiss* case (308 U. S. 321), as the Circuit Court of Appeals suggests (at 489). In the *Weiss* case this Court held that the particular consent there relied upon was void because obtained by illegal means and the Court emphasized the fact that the original interception itself had not been consented to. However, assuming that a consent voluntarily given would be effective at any time, that still does not answer the question raised in this case. For here there was no consent to the interception at any time. If any acquiescence can be inferred from the fact that Messman turned witness for the government, that is negatived by the finding of the Circuit Court of Appeals that his becoming such witness was due to the very illegality itself. No consent can be inferred in such circumstances. (*Weiss* v. *United States*, *supra*.) In any event the consent of one party to a conversation is not enough. (*United States* v. *Polakoff*, 112 F. (2d) 888, cert. den. 311 U. S. 653.)

In the absence of sufficient consent the interception of the wires was illegal and, therefore, any divulgence of the messages or any use of their contents is prohibited. (*Nardone* v. *United States*, *supra*.)

It is, therefore, clear that in the case at bar Messman's evidence was the result of illegally intercepted messages and so barred by the plain language of the statute.

* * * * * * *

We believe that we have thus shown that the arguments advanced in the opinion below are lacking in substance. And the rule laid down is impossible of any application which is consistent and sensible. Let us see what, in practice, becomes of the rule promulgated by the Circuit Court.

that a witness may be precluded from testifying when induced to do so because of illegal wiretapping, but that this follows only if talks by the defendants were overheard. Surely the court did not intend to confine its application to a case where all the tapping involved a single defendant—that would give it so narrow a scope as to be meaningless. Yet if the requirement that conversations of objecting defendant be tapped have significance that tapping must have played a real part in getting the witness to testify. But where there are many defendants and the tapping is of all their wires and also the wires of others, how can the influence of the conglomerate tappings be unscrambled and attributed to particular defendants? Does not, in such a case, each defendant share in the objection raised to the tappings of others? And, if it should happen that the conversations of one of the defendants were never tapped can it be that the witness can testify against him alone? To such perplexities and absurdities are we driven if we follow the rule proposed below. No such complications result if the requirement that conversations of the defendants have been tapped be eliminated.

And in reaching that result we should not be deterred by any formula such as that constitutional rights are personal only. For in essence what the defendants are here urging is not that they can take advantage of a wrong done to another, but that a wrong is being done them. That can perhaps be illustrated by an extreme instance. This Court has set aside convictions obtained by the torture of the defendants. (*Brown* v. *Mississippi*, 297 U. S. 278, cf. *Chambers* v. *Florida*, 309 U. S. 227.) Surely the result would have been the same had the torture been applied to only one of the accused and he, in consequence, had testified against the others. These would have been entitled to urge, in their own right, that evidence so obtained could not be used against them. Is it conceivable that the prosecution

could be heard to say that the right to object was personal to the one tortured?

So, here, petitioner complains that a wrong has been done him by the use against him of testimony obtained in violation of the plain command of the law, obtained, moreover, by the agencies of government charged with the duty of enforcing the law. Whether that evidence consist of the wire taps themselves or of evidence obtained by the use of the wire taps it is condemned by the statute. It should, therefore, be barred irrespective of the circumstance that the wires of petitioner himself were never tapped, nor any of his conversations overheard.

Point II.

The District Court Unduly Restricted the Scope and Conduct of the Preliminary Hearing.

The Circuit Court of Appeals disposed of this contention in a rather summary fashion (*R. 30, 31;* 120 F. (2d) at 491, 492), indicating indeed that the issue was immaterial in view of its holding that petitioners could not raise the issue of the illegality of Messman's testimony and because the prosecution had not sustained the burden of proof as to the source of the testimony of that witness. On the second of these points the Circuit Court of Appeals is correct. It is only if this Court should reject the view of the Circuit Court of Appeals with regard to the taint on the testimony that the conduct of the preliminary trial becomes material.

It is submitted, however, that the Circuit Court of Appeals was not correct in supposing the issue to be immaterial if petitioners had no standing to question the taint. For it is precisely at the preliminary hearing that facts might have been developed to show that petitioners did have a standing to complain. Petitioners had no independent means of knowing whether their own wires or conversations had been tapped. Only a thoroughgoing examination of all

the documents and data in the possession of the government could disclose the facts.

1. It is clear that the Trial Court greatly restricted the investigation. This was concerned not primarily with the Government's right to call Messman and Garrow as witnesses, but with the Government's right to use any evidence at all, it being defendant's contention that all of the Government's evidence was obtained as the result of illegal wiretapping.

The Trial Court restricted attempts on the part of defendants to have the Post Office Inspector Shea and the insurance company's attorney Bernstein justify their general statements that they had evidence independent of the wiretapping. The Trial Court permitted these witnesses to give their conclusions and opinions as, for instance, when Shea said: "I knew we had a complete mail fraud case" (R. 280). This the court refused to strike out. (See also R. 308). Similar events occurred during the examination of the Assistant United States Attorney Dailey (see R. 625, 675, 753, 757).

The Circuit Court of Appeals recognized that in several instances the Trial Judge had expressed himself in a way "that seemed to restrict the examination unduly" (*R. 30*). It considered these matters not important because of the supposed "complacence" of the accused. It is somewhat difficult to know what this rests upon in view of the persistent effort on the part of defendants' counsel to pursue various roads which the Trial Court blocked.

2. Moreover, the Trial Court did not permit defendants to examine various documents relied upon by the witnesses as the basis of their testimony or to mark these in evidence. (See R. 292, 323, 340, 370, 638 and 307.) In view of the Trial Judge's unfamiliarity with the details of the case, it was impossible for him to determine whether or not

a particular document contained evidence which had been obtained through the use of the forbidden wiretapping. Counsel for the defendants should have had the right to see for themselves what the documents contained in order to pursue any leads which they might give.

That in consequence the Government might have to disclose some of the evidence which it intended to use at the trial is, we submit, an inevitable consequence of the Government's original wrongdoing in indulging in wiretapping. We do not suggest that the Trial Court does not have discretion in such situations. We do not doubt that the Trial Court could exclude matters which had no possible relation to the defendants on trial. On such a subject the Trial Court would be able to exercise its judgment and an independent check by defendant's counsel would not be necessary. This, however, is not the basis upon which the Trial Court proceeded in the case at bar.

On this aspect of the case the Circuit Court had nothing to say.

Point III.

The Trial Court's Charge Was Unfair.

This Court has held that the Trial Judge must use great care that in discussing the evidence he should not mislead or give a onesided impression. See *Quercia* v. *United States*, 289 U. S. 466; *United States* v. *Murdock*, 290 U. S. 389.

While the charge in the case at bar is not as forthright in its expression of defendants' guilt as was the charge in the *Murdock* case, we submit that it partakes of the essential qualities of the charge condemned in the *Quercia* case, being both misleading and onesided.

We recognize that in the Federal courts the trial judge has the right to comment on the evidence. We submit, however, that this right involves a duty to state the con-

tentions of the parties with some particularity and not to draw conclusions concerning guilt or so phrase his comments that the jury acquires the conviction that the judge has found the defendants guilty.

Particularly with regard to the petitioner, Schwartz, the charge of the court failed to meet the standards laid down by this Court. The charge is replete with rhetorical questions, all of which suggest the guilt of petitioner. At no time did the court indicate the contentions advanced by the defense which might have been answers to the questions posed. We especially have in mind three instances of unfairness.

1. In discussing the relationship between petitioner and Messman and Garrow, the court said (*R. 14;* R. 5145):

> "I suggest that you turn your minds back to Messman and Garrow as you observed them. I think that together they were on the witness stand a matter of about three weeks. I think you had an ample opportunity for appraising them. What do you say as to the impression that they would be likely to create on consultants? Would consultants be able to observe, during a period of dealing with those men, what their essential qualities were? Is it likely that the defendants Goldstein and Schwartz were sufficiently equipped with the powers of perception to fairly well appraise Garrow and Messman?"

This was a grossly unfair method of presenting the case. The court suggested to the jury that petitioner's relationship with Messman and Garrow should be judged on the basis of the impression which these people made at the trial. That was certainly unfair. It is well known that persons engaged in illegal activities may for years deceive their most intimate associates. In many cases these wrongdoers collapse after their wrongs have been discovered and exposed, particularly where, as here, they have been for

some time in prison. To attribute to their former associates knowledge of the individuals drawn from their subsequent conduct and appearance is improper. The jury had a right to consider the relationship of petitioner with these witnesses only on the basis of the evidence which was adduced dealing with that relationship. To permit the jury to find the defendants guilty because of the impression which Messman and Garrow made on the witness stand, is wholly improper. A fair judge would have cautioned the jury against drawing the inference that defendants were to be found guilty because of the bad impression made by these witnesses on the stand and cautioned them that the defendants should be judged only in the light of the circumstances which existed at the time of the acts of which they were accused.

2. Another instance is the notation with regard to digitalis. The court (*R. 16;* R. 5148) sought to convey the impression to the jury that Schwartz should have been suspicious because of the notation concerning digitalis. It was the undisputed testimony that the use of the digitalis did not carry with it any sinister implications at all, that it was a known fact that digitalis was used in many heart cases. As a matter of fact, until the publicity resulting from the original arrests in these cases and the recital of some of the facts, few heart specialists would have been suspicious of the mere fact that a patient had had digitalis. They would normally have assumed it to have been used in connection with the patient's condition. To give to the jury the inference that this was consistent with guilt was a step far outside the province of an impartial trial judge. Surely, in referring to the subject of digitalis, the Trial Court, if it intended to be fair, should have at the same time called the jury's attention to these facts, leaving it to the jury to determine, of course, whether there were any particular suspicious circumstances in the instances referred

to. But to suggest to the jury that there was something inherently suspicious about the digitalis itself was both misleading and unfair. The Government in its brief in the Circuit Court of Appeals (p. 66) suggested that the court was justified in not referring to the well known use of digitalis because that fact was not in dispute. That is indeed a strange view of a court's charge. Surely, it is just facts which are not in dispute which the court can and should mention to the jury without qualification, it being the jury's province to determine only the disputed facts. After all, the purpose of the charge is to inform the jury and what better information can it receive than a statement of relevant facts not in dispute?

3. The third illustration dealing with this petitioner related to the *Kaplan* incident. Messman had substituted sputum and had so informed Schwartz. It was Schwartz' contention that thereafter he broke with Messman. The Court, however, in its charge did not refer in any way to this contention and again asked a number of rhetorical questions (*R. 15;* R. 5146,-5147). Not content with emphasizing implications from this incident which might be unfavorable to the defendant, the judge underlined his remarks by saying: "I wonder if I make that clear to you" and then he repeated the same thing again, emphasizing that he thought it "most important." This discussion was followed by a reference to Schwartz' testimony before the Grand Jury, the exact meaning of which is certainly not clear. What is clear, however, is that the judge was intending to reflect unfavorably on the defendant.

It is significant that in the entire portion of the charge dealing with Schwartz there is not a single suggestion favorable to the defense nor even a single reference to the contentions of the defense. Every one of the rhetorical questions was designed to obtain an answer unfavorable to

Schwartz. Surely it will not do for a Court thus to assume the role of the prosecuting attorney and attempt to cover it up by saying that he was merely suggesting questions for the consideration of the jury.

The Circuit Court of Appeals, in dealing with the charge, suggested that it is seldom possible to say more in the accused's favor than that he denies complicity and that juries are not very much influenced by what judges say anyhow (*R. 29;* 120 F. (2d) at 491). It is submitted that both points are without merit. Whatever may be the robusticity of particular juries it is well known that other juries are susceptible to influence. And the rules laid down by this Court well take that into consideration.

And the suggestion that all that a judge could say about a defense is that defendant denies guilt is astonishing indeed. Particularly, in a conspiracy case, where the government relies on inferences to be drawn from circumstances, there are many things which can be said by a defendant in explanation of those circumstances. Whenever the circumstances give an appearance of guilt, innocence can be established only by explanation. While the explanation may often not be persuasive it is a defendant's right, it seems to us, to have the Trial Court call the jury's attention to the explanation given as well as to the Government's contention as to the inferences to be drawn from the circumstances themselves. And when a judge not only asserts the Government's view alone, but does it in such rhetorical form as to suggest to the jury only one possible answer, then we submit the judge has overstepped the bounds of his function.

In opposition to the petition for certiorari, the Government in its brief (p. 17) contends that there were no adequate exceptions to the judge's charge. Counsel for this petitioner, Schwartz, expressly excepted to the inference which the Court asked the jury to draw from the conduct

and appearance of Messman and Garrow (see R. 5154, 5155). There were similar objections to the references to the sputum incident (R. 5155) and to the digitalis (R. 5156). It may be observed, moreover, that the Court's reaction to the various objections was hardly of a character calculated to help the jury or to encourage counsel to be more explicit.

It is well settled that the Trial Court may not indulge in argumentative remarks and that he may not assume the role of an advocate. The cases are quoted in the note to the *Murdock* case in 78 Lawyers Edition at 398 and 399. We particularly call this Court's attention to the rule laid down in *Palno* v. *United States*, 58 F. (2d) 111; where the Court said:

> "The evidence should be stated fairly, both that in behalf of the Government and that in behalf of the accused."

And in *O'Shaughnessy* v. *United States*, 17 F. (2d) 225, the Court said:

> "When there is evidence supporting a verdict of not guilty, argumentative statements, based on recitals of incriminating evidence only, are not warranted."

The use of rhetorical questions somewhat similar to those here employed was condemned in *Weare* v. *United States*, 1 F. (2d) 617. See also *Minner* v. *United States*, 57 F. (2d) 506 and *Johnson* v. *United States*, 270 Fed. 168.

Under all these authorities it appears clear that the charge of the Court in this case, omitting as it did any statement of the defendant's contentions or the evidence in support of the defense and consisting primarily of hypothetical questions disparaging the defendant was unfair, misleading and argumentative. Regardless of any other question in the case it requires reversal.

As we have already indicated, the Circuit Court of Appeals upheld the charge although it recognized that the judge was asking questions which called for damaging answers on the ground that the intimations to the jury were "oblique" and on the ground that in other portions of the charge he had advised the jury that they were not to take his opinions as authoritative. We do not believe that this Court will sanction an improper charge merely because at various points the Judge gives lip service to his obligation and tells the jury that they are free to render whatever verdict they think proper. The damage to a defendant is no less severe. It is obvious that a jury will take the particular comment of the Judge more seriously than his general admonition. Especially is that true when the entire portion of the charge dealing with a particular defendant is of the character here complained of.

It will be noted that the general admonitions, so much relied upon by the Circuit Court of Appeals, appeared in the early portion of the charge before the Judge began discussing the individual defendants. From the time he began discussing these defendants separately, the only word of caution uttered was in relation to the credibility of witnesses. From that time on the entire discussion was in the form of hypothetical questions of more or less damaging character. The nature of these questions became progressively more unfavorable to the defendants. They reached their most serious character in connection with petitioners Goldstein and Schwartz, particularly, indeed, with regard to the latter. It is difficult to understand how the Circuit Court of Appeals was able to dispose of these persistent questions as merely "oblique" intimations or, where it found, in the many pages of the charge dealing with these two petitioners that the Judge had exercised "overabundant caution" in refraining from invading the

jury's province. And while it is true that the questions occurred in a long charge, they did not occur in isolated portions of that charge, but were concentrated in the only part of the charge dealing with the complaining defendants. It is even significant that the Judge abruptly ended his charge on this note without any repetition of his general admonitions to the jury. The final impression must clearly have been seriously damaging to the defense.

If a mere reading of the printed words shows this partisanship, how much more effective is it when delivered by the Judge in his robes to the twelve jurymen, who not only observe the deference and homage paid to the Court in the court room but themselves do likewise. Did not appellant Schwartz have to overcome an obstacle which no constitution or original rule of law ever intended that he should overcome? The statements to juries that they are the sole judges of the facts become as with "the tongue in cheek" if charges such as these are sanctioned.

We submit that the view of the Circuit Court of Appeals is contrary to that announced by this Court and the proper rule elsewhere recognized.

Conclusion.

It is respectfully submitted that to permit the conviction in the case at bar to stand would result in a substantial nullification of the purpose which Congress has made manifest in enacting the Communications Act. It is significant in this connection that Congress has repeatedly refused to amend this Act so as to permit wiretapping by government officials even in a limited class of cases and under strict supervision—and this despite the fact that such bills have been sponsored by the Attorney General.[5] Surely this Court

[5] See hearings in 77th Congress First Session on H. R. 2266 and H. R. 3091. See also H. R. 4228 of that Congress.

should not sanction an interpretation of the statute which runs counter to its general purpose, namely, the protection of the people from the "dirty business" of wiretapping. In any event a new trial should be ordered because of the unfair charge of the Trial Court and its improper action in restricting the conduct of the preliminary hearing inquiring into the extent of the wiretapping.

Respectfully submitted,

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APPENDIX.

Federal Communications Act, 47 U. S. C. 605:

"No person receiving or assisting in receiving, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

Provided, that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."